

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JEFF GROH,

4 Petitioner :

5 v. : No. 02-811

6 JOSEPH R. RAMIREZ, ET AL. :

7 - - - - - X

8 Washington, D. C.

9 Tuesday, November 4, 2003

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:03 a.m.

13 APPEARANCES:

14 RICHARD A. CORDRAY, ESQ., Grove City, Ohio; on behalf of
15 the Petitioner.

16 AUSTIN C. SCHLICK, ESQ., Assistant to the Solicitor
17 General, Department of Justice; as amicus curiae,
18 supporting the Petitioner.

19 VINCENT J. KOZAKIEWICZ, ESQ., Boise, Idaho; on behalf of
20 the Respondent.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 02-811, Jeff Groh v. John - Joseph R. Ramirez.

Mr. Cordray.

ORAL ARGUMENT OF RICHARD A. CORDRAY
ON BEHALF OF THE PETITIONER

MR. CORDRAY: Thank you, Mr. Chief Justice, and may it please the Court:

I'd like to reserve 2 minutes of my time for rebuttal. This case concerns a mistaken description on the face of a judicial warrant that the court of appeals held deprived Agent Groh of qualified immunity, subjecting him to personal liability for damages in this Bivens action. The Ninth Circuit reached this result despite the fact that the record here shows Agent Groh's manifest good faith and reasonable course of conduct, including three key points.

First, the record shows that the affidavit and application submitted to the magistrate were sufficient and comprehensive. Second, the magistrate personally reviewed and approved the application and expressly referenced the affidavit in the warrant he issued. And third, the search as executed conformed to the limits set

1 out in the affidavit and -

2 QUESTION: Mr. Cordray, what does the
3 Constitution provide specifically about this?

4 MR. CORDRAY: The Constitution provides that
5 individuals will not be subject to unreasonable searches
6 and seizures and that warrants will not issue except upon
7 probable cause, and stating with particularity the items
8 to - place to be searched, items to be seized.

9 QUESTION: With regard to that last phrase, why
10 don't we just apply it?

11 MR. CORDRAY: I think you do apply it in this
12 case and this warrant here -

13 QUESTION: But the warrant refers to the house.

14 MR. CORDRAY: Yes.

15 QUESTION: It doesn't list anything that they
16 were searching for.

17 MR. CORDRAY: The warrant itself - and if we turn
18 to the petition for certiorari appendix, page 26a,
19 specifically references the affidavit. The affidavit,
20 application, and draft warrant form were submitted to the
21 magistrate as one package. They were reviewed by the
22 magistrate and resulted in an issuance of authority to
23 search -

24 QUESTION: Who prepared the warrant?

25 MR. CORDRAY: The draft of the warrant form

1 itself was done initially by Agent Groh. It was then
2 signed and executed by the magistrate who approved it.

3 QUESTION: Well, but on its face it referred to
4 the house, not the items being looked for.

5 MR. CORDRAY: It did, and that's the mistaken
6 description on the face of the warrant. If you look at
7 the application and -

8 QUESTION: Well, you know, why not just apply the
9 constitutional provision? I mean, why couldn't the agent
10 be responsible for checking the warrant?

11 MR. CORDRAY: Well, I - I think there's two
12 questions there. I think if you - if you apply the
13 constitutional provision here, the warrant here
14 specifically references the affidavit. The magistrate
15 says, I am satisfied, page 26a -

16 QUESTION: But the affidavit was not attached to
17 the warrant.

18 MR. CORDRAY: It was attached to the warrant,
19 accompanied the warrant when - when the materials went to
20 the magistrate for approval - it was -

21 QUESTION: Yeah, but not - not when it was taken
22 to be executed.

23 MR. CORDRAY: It - it also accompanied the
24 warrant when the officers were briefed on the nature of
25 the search. It did not accompany the warrant at the scene

1 because it was placed under seal by the court, which is
2 done routinely in many cases for - for a variety of
3 important law enforcement purposes. But here -

4 QUESTION: It - it - it seems to me that at - at
5 some point in this analysis of - and specifically on the
6 point that you're addressing with Justice O'Connor - that
7 you have to confront the language in - in Leon in which
8 the Court said, depending on the circumstances of the
9 particular case, a warrant may be facially - so facially
10 deficient that it cannot comply with the Leon rule. I was
11 reading your - your brief and kind of waiting with
12 suspense for you to address this point and it only comes
13 up at the last few pages of the reply brief and you say
14 it's a dictum. I think you have answers to the - to the
15 point, but it seems to me rather central for what you're
16 discussing right here. This was in one sense of the word
17 facially deficient, no - no question about that.

18 MR. CORDRAY: Yes, although this Court has -

19 QUESTION: And it might be that the Sheppard case
20 is what helps you, but -

21 MR. CORDRAY: I think it does, Your Honor. The
22 Sheppard case makes clear - footnote 7, the Court says
23 that if the warrant says, has some sort of suitable words
24 of reference, see attached affidavit or see affidavit,
25 that you then can move beyond the four corners of the

1 paper itself and look to the materials that are part of
2 the document or your record in front of the magistrate
3 that are subject to subsequent judicial review, and the
4 contents of the affidavit can inform the contents of the
5 warrant.

6 QUESTION: Mr. Cordray -

7 QUESTION: Well, did - did the warrant here and
8 the warrant in Sheppard, were they on all fours insofar as
9 a cross-reference?

10 MR. CORDRAY: They were on all fours in two
11 respects. First of all, the warrant in Sheppard was
12 facially defective. It said that you would search for
13 controlled substances. In fact, they were searching for
14 evidence of homicide investigation.

15 QUESTION: Right, almost as bad as the mistake
16 here.

17 MR. CORDRAY: Yeah, in - in some ways worse,
18 because it specified the search for different evidence.
19 Here at least on the face of the warrant it's clear that
20 there's some sort of discrepancy, and you can inform that
21 by looking at the affidavit -

22 QUESTION: But did the Massachusetts case have a
23 cross-reference to an affidavit even though the affidavit
24 wasn't appended?

25 MR. CORDRAY: It did not, in fact, and the Court

1 said that if it had contained some sort of cross-
2 reference, then you could inform the contents of the
3 warrant from the contents of the affidavit. That's what
4 we believe -

5 QUESTION: But doesn't it make sense to assume
6 that the cross-reference has to be capable of informing of
7 what is left out? And in this case, number one, there is
8 nothing attached to the warrant. No one reading the
9 warrant could possibly figure out what within this house
10 was - was being searched for.

11 MR. CORDRAY: I think that's -

12 QUESTION: And once again I guess I go back to
13 Justice O'Connor's question. Why don't we apply the - the
14 Fourth Amendment the way it's written, and it says that
15 the warrant shall particularly describe, not some other
16 document under seal.

17 MR. CORDRAY: I - I think that that's not true in
18 the important respects under the Fourth Amendment. The
19 affidavit was part of the documents given to the
20 magistrate for prior judicial approval -

21 QUESTION: The Fourth Amendment says it's the
22 warrant that is supposed to particularly describe, not
23 documents given to a magistrate.

24 MR. CORDRAY: What I'm saying is there are three
25 different potential times that matter here. One is prior

1 judicial approval of the search. The warrant and
2 application and affidavit were all together to the
3 magistrate. Second, in informing the officers of how to
4 conduct the search, which they did here in accordance with
5 the constraints, the - the material was provided to the
6 officers. The third question is whether the homeowner at
7 the scene has some independent constitutional right to see
8 the warrant and the supporting materials before a search
9 can proceed. This Court has never held that that's a
10 constitutional requirement and would be flatly
11 inconsistent with criminal -

12 QUESTION: Whether - whether the homeowner has
13 the right or whether the point is to make sure that the
14 officers executing the warrant can check what's in front
15 of them and find out how far to go, the fact remains that
16 the Fourth Amendment says the warrant is supposed to
17 particularly describe. This didn't, it had no document
18 appended to it that did.

19 MR. CORDRAY: That's not correct, Your Honor.
20 This warrant specifically references the affidavit and the
21 affidavit accompanied to the magistrate and to the
22 officers before they searched -

23 QUESTION: It may refer to it, but if it's not
24 there, nobody can figure out what it says.

25 MR. CORDRAY: Well, they can, in fact, because

1 the documented record before the magistrate allows
2 posterior judicial oversight of how the search -

3 QUESTION: Not when the police are at the scene
4 they can't.

5 MR. CORDRAY: That is correct. At the scene -
6 the Ninth Circuit made a fundamental flaw in its opinion.
7 It assumed that the Fourth Amendment is about allowing
8 homeowners at the scene to -

9 QUESTION: It doesn't have to make that
10 assumption in - in order to apply the Fourth Amendment as
11 written. It could perfectly well make the assumption that
12 the point of the Fourth Amendment description was to make
13 sure that the officers at the scene knew how far they
14 could go.

15 MR. CORDRAY: Correct. And they had the warrant,
16 affidavit, and application -

17 QUESTION: But there's some might not - some
18 might not have been like the officer here, like Officer
19 Groh, might not have even seen the attached affidavit. On
20 the face of this, this does look like the hated general
21 warrant. It says, here's a house and there's no bounds at
22 all, so it looks like this is exactly what the Fourth
23 Amendment was getting at. And with respect to Sheppard, I
24 had a question, maybe you can straighten me out on that.
25 Sheppard said the good-faith exception applies, but to

1 apply - apply an exception, wouldn't you need to have a
2 Fourth Amendment violation in the first place?

3 MR. CORDRAY: This was a subject of discussion in
4 Sheppard. The separate opinion by Justice Stevens states
5 specifically, and presents an argument for why the Fourth
6 Amendment was not violated in that case. The majority was
7 willing to assume a violation on the record before it,
8 didn't specifically decide the Fourth Amendment question
9 but assumed such a violation and went on to apply the good
10 faith -

11 QUESTION: So that - that case doesn't answer the
12 question, was there a Fourth Amendment violation?

13 MR. CORDRAY: I would agree with you that -

14 QUESTION: And why do you have to ask that
15 question?

16 MR. CORDRAY: Beg your pardon?

17 QUESTION: Why do you have to ask that question?
18 Why do you have to establish, as you seem to be trying to
19 establish, that this complied with the Fourth Amendment,
20 which, if you read the Fourth Amendment, it clearly
21 didn't. But what we're discussing here is what is the
22 remedy for its failure to comply with the Fourth
23 Amendment, aren't we?

24 MR. CORDRAY: Well -

25 QUESTION: If - if I disagree with you that there

1 - that there is a Fourth Amendment violation, do I have to
2 find that it was proper as a remedy for that violation to
3 hold - to hold this agent liable?

4 MR. CORDRAY: Certainly not, Your Honor, and I do
5 agree with Justice Ginsburg's point that Sheppard is
6 probably more germane to the qualified immunity inquiry
7 here than perhaps to the Fourth Amendment inquiry, given
8 that the Court did not explicitly decide the Fourth
9 Amendment issue in Sheppard. But here, we would say that
10 qualified immunity applies on two distinct grounds.
11 First, the Court has adverted in Malley v. Briggs, it
12 wasn't a specific holding, that if in fact the conduct of
13 the officers is such that the good-faith Leon exception
14 would apply in a criminal suppression hearing then, in
15 parallel, qualified immunity should apply in a civil
16 action against the officer. That would be one ground for
17 finding qualified immunity here and a sufficient ground.

18 In addition, if the law was not clearly
19 established at the time that - a number of points that the
20 Ninth Circuit decided for the first time in this case -
21 that the warrant cannot, by suitable words of reference,
22 incorporate the contents of the affidavit. Number two,
23 that the officers are obliged constitutionally after a
24 warrant issues to double check the magistrate's handiwork
25 and correct any errors that they find. And number three,

1 that they cannot at the scene, as Agent Groh attempted
2 reasonably to do here, inform the homeowner of exactly
3 what the nature of the search was. It was done verbally
4 in person with the wife and over the telephone with the
5 husband, and -

6 QUESTION: Well, you - you say, the Ninth Circuit
7 said they couldn't inform the homeowner?

8 MR. CORDRAY: Said that that would not be
9 sufficient to - to correct -

10 QUESTION: Yeah, it didn't say that they couldn't
11 have, but it's - it's - the Ninth Circuit said that the
12 homeowner had a right to be shown the warrant, I take it,
13 did it not?

14 MR. CORDRAY: Didn't specifically hold that, but
15 certainly seemed to presume it, that the - not only the
16 warrant but all the supporting materials so that the
17 homeowner could exercise some self-help right at the
18 scene, block the officers, and attempt to interfere with
19 their execution of -

20 QUESTION: The Ninth -

21 QUESTION: What do the Federal rules say about
22 the - what the police or the officers have to do with the
23 warrant in the search of a house?

24 MR. CORDRAY: Criminal Rule 41, which this Court
25 has said incorporates or is certainly consistent with

1 Fourth Amendment principles, says that a warrant needs to
2 be left at the scene after a search is completed if
3 property is taken along with an inventory of the property.
4 There's no suggestion the rule does not require the
5 warrant be given to the homeowners at the outset as long
6 as they're reasonably informed -

7 QUESTION: Doesn't it talk - or correct me if I'm
8 wrong - about serving the warrant?

9 MR. CORDRAY: It - it talks about a number of
10 things. It talks about obtaining a warrant, keeping a
11 documentary record in front of the magistrate so that
12 subsequent judicial review is available. It also talks
13 about executing the warrant at the - at the scene. If the
14 Court wishes to refer to Criminal Rule 41, it's been
15 amended a couple of times, I believe the current version
16 is 41(f) -

17 QUESTION: Where is that in the papers?

18 MR. CORDRAY: It's not in the documents here. I
19 apologize, Your Honor. But 41(f)(3), it's referred to in
20 the Solicitor General's brief and in our brief, is that
21 they must give a copy of the warrant, receipt for the
22 property taken, after the search is completed, but not
23 before the search begins, and that makes a great deal of
24 sense. The Fourth Amendment is about making sure that
25 there is - there is prior judicial authority to proceed

1 with a search and that there is documentation available
2 later to check the search and make sure it did not exceed
3 the authority -

4 QUESTION: You mentioned the later documentation,
5 but isn't there an interest in letting the homeowner know
6 that the man has authority to make the search?

7 MR. CORDRAY: Yes, which Agent Groh -

8 QUESTION: So, shouldn't - shouldn't he have to
9 display it if - if requested?

10 MR. CORDRAY: I believe that if - if he's asked
11 for the warrant before he can enter, what would be
12 reasonable in the circumstances would be to show the
13 warrant.

14 QUESTION: And he'd have a duty to do that?

15 MR. CORDRAY: I - I believe that in many cases
16 that would be the most reasonable thing, and therefore
17 perhaps the Constitution would have required it.

18 QUESTION: That's not my question. Would he have
19 a duty to do that?

20 MR. CORDRAY: I'm not certain of that, but I
21 think it would be better practice and reasonable conduct.

22 QUESTION: Go back -

23 QUESTION: It doesn't say it in the rule at all.

24 QUESTION: Could you go back to Justice Scalia's
25 question?

1 MR. CORDRAY: Sure.

2 QUESTION: I thought that this was a very simple
3 case. Somebody really mucked up the warrant, okay? They
4 made a technical mistake. Instead of saying, seize - look
5 for and seize some guns, they said, look for and seize a
6 house, all right? Now, nobody could think that that made
7 any sense.

8 MR. CORDRAY: Yeah, except that before printing
9 the affidavit -

10 QUESTION: Nobody. No - you don't think it does,
11 I don't think it does. So you can say one of three
12 things: A, that the warrant is constitutional, which is
13 what you're arguing, which is a little tough, because I
14 guess if we said this was constitutional, we'd have to say
15 a warrant is constitutional. If it says seize and then it
16 says I'm not going to tell you, look in vault three of the
17 Kremlin, you know, to see what we're supposed to seize. I
18 mean, that's a tough route that you're taking.

19 The second route is what Justice Scalia
20 suggested, which is to say, well, it isn't really his
21 fault, the search team leader, because he was in good
22 faith. For me, that's tough because I - if you cast his
23 eye on this piece of paper and just glanced at it, he
24 would have seen it was faulty. Route three is to say,
25 they're right in their lawsuit, let them bring it,

1 damages, by the way, are going to be pretty low, okay?
2 Now you explain to me why it should be route two, which is
3 Justice Scalia's question, rather than just route three.

4 MR. CORDRAY: Sure. This Court said in Malley
5 that if in fact the officers make a mistake of fact in
6 good faith that, if in fact Leon would apply to avoid
7 suppressing that evidence in a criminal prosecution, the
8 parallel should apply and qualified immunity would be
9 appropriate in a civil action. I think that that is what
10 makes the most sense of the objective -

11 QUESTION: Now - now tell me why, because as I've
12 made my point, it sounds to me that this man did not
13 behave sensibly, because if he just looked at the piece of
14 paper he would have seen in 3 seconds it says, seize the
15 house, and we're not out here to seize the house, we're
16 out to seize some guns.

17 MR. CORDRAY: The magistrate -

18 QUESTION: So it wasn't like a minor, common
19 mistake -

20 MR. CORDRAY: The magistrate -

21 QUESTION: - so why was that reasonable?

22 MR. CORDRAY: The magistrate also looked at this
23 piece of paper and failed to notice the error. The
24 materials were made -

25 QUESTION: So two people -

1 QUESTION: How do we know that the magistrate did
2 look at the piece of paper?

3 MR. CORDRAY: Because he signed the piece of
4 paper.

5 QUESTION: Any magistrate who looked at that
6 piece of paper would say your warrant - your warrant
7 application or the form you've given me does not indicate
8 what you're searching for, unless you really are going to
9 put the house up on a flatbed truck and take it away,
10 which we know you're not. It's - it's - the obvious, I
11 think the obvious probability is that the - the agent did
12 not read what his secretary had typed in and the
13 magistrate did not read what the agent presented to him,
14 and this sometimes happens. I've had it happen to me.
15 You hand the magistrate the application and he says, where
16 do you want me to sign? Isn't that probably what
17 happened?

18 MR. CORDRAY: It's hard for me to know exactly
19 what happened subject with the magistrate. We do know
20 that he signed the warrant. We also know that he signed
21 the application, which was presented to him, that had the
22 particular description of the items to be seized. That's
23 at page 28a of the appendix.

24 QUESTION: Maybe he should be liable too. I
25 mean, except for judicial absolute immunity, I - I don't

1 know, you say, you know, the magistrate's just as bad.

2 What does that prove? It doesn't prove anything.

3 MR. CORDRAY: Let me bore in on the qualified

4 immunity issue, if I may, on both counts. First -

5 QUESTION: Before you do that, just one

6 preliminary question. Justice Scalia suggested earlier

7 you could go right to qualified immunity to get all the

8 rest, but I thought the - that this Court's precedent said

9 you have to make a ruling, did it violate the Fourth

10 Amendment, before you get to qualified immunity.

11 MR. CORDRAY: That's how we read the Court's

12 cases, at least to the last 6 or 7 years. It's been a

13 pretty consistent approach.

14 QUESTION: That may well be, but you don't have

15 to argue it. My point was that you -

16 MR. CORDRAY: That's fine.

17 QUESTION: - didn't have to argue it -

18 MR. CORDRAY: That's fine.

19 QUESTION: - not that we don't have to decide it.

20 MR. CORDRAY: That's fine. Let me - let me say,

21 under Massachusetts v. Sheppard, this is clearly in good

22 faith here. Qualified immunity should apply. Why?

23 Because this agent prepared all the materials, submitted

24 it all to the magistrate, is the one who personally had

25 the interchange with the magistrate back and forth,

1 whereupon the magistrate approves the search and executes
2 a warrant. He did not catch the error, that's true.

3 QUESTION: He didn't have a bad motive?

4 MR. CORDRAY: No, I mean that he - he acted in
5 good faith, objectively, reasonably on the course of the
6 record. He - he knew what search he was asking for. He
7 submitted those materials. There's a particular list of
8 the items to be seized in the application and in the
9 affidavit. It was omitted from the warrant. That's why
10 we're here. Nonetheless, this is exactly the kind of
11 case, and many court of appeals have held this, in which
12 Leon would apply in a criminal suppression hearing.

13 Also, the Ninth Circuit here reached this result
14 by announcing a new rule. They said an officer has a duty
15 to proofread a warrant even after it's issued by a
16 magistrate. They had rejected that rule in Marks v.
17 Clarke just a year earlier, and now they reversed ground
18 and they announce a new rule. That is classically the
19 basis for qualified immunity under this Court's strong
20 precedents that the - the officer cannot be held to
21 predict the future course of constitutional law. Should -
22 do they know there's a Fourth Amendment? Do they know it
23 contains a particularity requirement? Presumably they do.
24 But do they know how that applies in all circumstances and
25 that they have a duty to proofread a warrant even though

1 they've made out the materials, they've submitted to the
2 magistrate, they've been there with the magistrate and
3 gotten the approval as they assumed that they saw it?

4 Massachusetts v. Sheppard very strongly says
5 that - that we do not hold the officers to have a further
6 duty in that instance. If you hold it in this case for
7 the first time and anew, the qualified immunity at a
8 minimum should be appropriate for the officer here.

9 If I may reserve the balance of my time.

10 QUESTION: Very well, Mr. Cordray.

11 Mr. Schlick, we'll hear from you.

12 ORAL ARGUMENT OF AUSTIN C. SCHLICK

13 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

14 SUPPORTING THE PETITIONER

15 MR. SCHLICK: Mr. Chief Justice, and may it
16 please the Court:

17 This Court has rejected a technical perfection
18 standard in construing a warrant. In Steele v. United
19 States, the warrant authorized a search of 611 West 46th
20 Street. This Court determined, in light of the
21 circumstances of the case, including the affidavit that
22 was submitted to the magistrate in that case, that the
23 search properly was conducted for 609 West 46th Street, as
24 well as 611, and the rules - the rules stated in Steele v.
25 United States is that a warrant satisfies the

1 particularity requirement of the warrant clause if an
2 officer executing a search could determine with reasonable
3 effort what the magistrate authorized.

4 QUESTION: So do you say this is just a technical
5 mistake? If it said, go to the Empire State Building and
6 seize the Empire State Building, that's just a technical
7 mistake? I mean, they may have made it for a technical
8 reason, but you'd have no idea what they're supposed to
9 look for.

10 MR. SCHLICK: And it - the question in that case,
11 Your Honor, would be, is it clear what the magistrate
12 authorized? In this case -

13 QUESTION: No, it isn't clear. How is it clear?

14 MR. SCHLICK: In - in that case, if it is not
15 clear, then there is a violation of the particularity
16 requirement -

17 QUESTION: But you're saying here it's clear
18 because the affidavit said it, but the affidavit's locked
19 away somewhere and nobody can look at it.

20 MR. SCHLICK: No, it's - it - is - in fact it was
21 unsealed, and typically when warrants are put - when
22 applications are placed under seal, there's a provision
23 for unsealing the application upon the indictment or after
24 a period of time, or a motion to unseal can be brought,
25 which could have been done in this case, but in fact, the

1 motion was brought by the Government in the - in the first
2 place.

3 QUESTION: So, in fact, what a homeowner's
4 supposed to do is if the warrant - he looks at it, by the
5 way, it's blank, it's blank. And the officer says, don't
6 worry, I'm not going to tell you what I'm looking for, but
7 just go somewhere to a court house and make a motion to
8 unseal an affidavit and that will solve the problem Is -
9 is that what the Fourth Amendment is about?

10 MR. SCHLICK: The Fourth Amendment does not
11 protect, contrary to the Ninth Circuit's belief, the
12 Fourth Amendment does not protect the - a supposed
13 interest in reviewing the warrant during the search. As
14 Mr. Cordray explained, that's inconsistent with Rule 41.
15 It also would render impossible electronic surveillance.
16 The - there also would be a serious safety concern. We
17 simply do not want citizens contesting at the scene of the
18 search whether the scope - whether the scope of the search
19 is lawful. It is safer for everyone -

20 QUESTION: Well, I don't want - the - the court
21 of appeals seemed to envision some sort of a collaborative
22 proceeding where there's a conversation between the
23 officers executing the warrant and the homeowner and - and
24 that - that seemed to me without foundation. On the other
25 hand, I suppose the homeowner has a right to look at the

1 warrant and to comment - to comment on it.

2 MR. SCHLICK: Under Rule 41, the right attaches
3 when property is seized, as part of the receipt for the
4 property that's seized. There may, as with -

5 QUESTION: Well, I - I know, but there's a knock
6 on the door and the policeman says, I have a warrant. And
7 I say, may I see it? He says, well, oh no, you can't see
8 it until I leave. Is that - is that your position?

9 MR. SCHLICK: No, again that would be analyzed
10 under the law of knock and announce, and it may be
11 reasonable under the circumstances -

12 QUESTION: If they have a warrant, do I have a
13 right to read the warrant?

14 MR. SCHLICK: And the question would be -

15 QUESTION: The homeowner.

16 MR. SCHLICK: If - if the homeowner denied entry
17 until a copy of the warrant is provided, the officer would
18 be faced with the question, is this a constructive denial
19 of entry? Is there some exigency for getting into the
20 property? And it may be reasonable under the
21 circumstances -

22 QUESTION: No, there - no, there - there's no
23 exigency because there's only one person there and he's at
24 the door and that person says, I'd like to read this
25 warrant. Does he have the right to do that before the

1 officer enters?

2 MR. SCHLICK: If there were no exigencies, then
3 ordinarily the reasonableness principle probably would
4 require that, but the purpose of the particularity
5 requirement, it's very clear, is to ensure that the search
6 is conducted in accordance with what the magistrate
7 authorized.

8 QUESTION: Why isn't that in our rule if - if
9 you're willing to concede that that's a constitutional
10 requirement?

11 MR. SCHLICK: We - we are not conceding it's a
12 constitutional requirement. We're saying that under
13 certain circumstances -

14 QUESTION: Well, that - you say - you say it's
15 part of the reasonableness requirement to show it to the
16 homeowner if he demands it.

17 MR. SCHLICK: Under - under circumstances where
18 there is no exigency where the request to see the warrant
19 -

20 QUESTION: Under normal circumstances, when there
21 is no exigency. Under normal circumstances, if the
22 homeowner demands to see the warrant, you think it is
23 constitutionally required that you show the homeowner the
24 warrant?

25 MR. SCHLICK: If - if the choice - if the

1 homeowner denies entry, there's no exigency, and the
2 officer's faced with the choice of break down the door or
3 show the warrant, then reasonableness may require showing
4 the warrant. But - but no, there is no general - there is
5 no general reasonableness requirement, and as I've said,
6 this Court's cases, cases such as Dalia and electronic
7 surveillance contexts make clear -

8 QUESTION: Your - your point about electronic
9 surveillance seems to me quite - quite forceful. You do -
10 you do not have to give - give the person who's being
11 electronically surveilled a - a warrant beforehand. He
12 has no opportunity to see what's - what's being done. I
13 don't see why the constitutional principle would differ
14 with regard to a - to a physical search.

15 MR. SCHLICK: Our position, Your Honor, is there
16 is no general requirement of providing a copy of the
17 warrant, and the Ninth Circuit asserted an interest in
18 reviewing the warrant during the search is simply not
19 protected by the particularity requirement -

20 QUESTION: But you - but you are saying that in -
21 in circumstances, you gave an example, the reasonableness
22 requirement would result in an obligation to show the
23 warrant.

24 MR. SCHLICK: It - it may under circumstances,
25 but not as a general rule.

1 QUESTION: Well, let's - let's take - let's -
2 let's go one step further than the - than the hypothetical
3 you - you were dealing with a moment ago. Let's assume
4 the homeowner comes to the door and says, I'd like to see
5 the warrant. And they say, well, here it is, and the
6 homeowner says, I - I'd like to read it, and the police
7 say, no, you can't read it. And the homeowner says, look,
8 I'll give you whatever you've got a right to seize under
9 this warrant. You don't have to tear the house apart,
10 just let me see what it is you want. The police answer,
11 no, we're not going to tell you, we're going to go through
12 the house ourselves. Do you think that would be
13 reasonable execution of the warrant?

14 MR. SCHLICK: Yes, I - I think it - it - in most
15 circumstances would be reasonable, yes, that the -

16 QUESTION: They would have a right to - to - to
17 tear the house apart when the homeowner stands at the
18 threshold and says, tell me what you've got a right to
19 seize and I'll get it for you.

20 MR. SCHLICK: The - the question - the question
21 in that case would be whether the search was conducted
22 within the scope of the warrant. If so, it would be a
23 valid search and -

24 QUESTION: The question is whether it's a
25 reasonable search, and that includes an - an issue about

1 the manner in which the warrant is executed.

2 MR. SCHLICK: A - a search would not be rendered
3 unreasonable by virtue of a discussion between the
4 officers and the citizen. The question would be how the
5 search was conducted. I would like to discuss the law -

6 QUESTION: Well, I - I suppose that the officer
7 doesn't have to take the word of the homeowner either that
8 I'm getting you exactly what you want, you know, if the
9 guy's charged with some sort of fraud, maybe he's going to
10 continue.

11 MR. SCHLICK: That - that's true and, of course,
12 the things that are seized may not conform to the warrant
13 because of the plain view rule that the officer may seize
14 things that aren't covered in the rest of the warrant.

15 QUESTION: But -

16 MR. SCHLICK: Now, under the law of qualified
17 immunity -

18 QUESTION: Mr. Schlick, as far as the rule is
19 concerned, the rule - the heading is receipt, so the rule
20 - rule doesn't address this problem. It goes to what you
21 do in inventory and then you give a receipt, if you're
22 going to take away property give a receipt, and by the
23 way, give the warrant with it. So I don't think we can
24 read this rule as saying you don't have to give the
25 warrant if the homeowner requests it. It just says if

1 you're taking away property then you give a receipt, and
2 part of the receipt is the warrant.

3 MR. SCHLICK: The only requirement to providing
4 the warrant is if property is taken away. Agent Groh also
5 is protected from suit under the law of qualified
6 immunity. There was - there's no clearly established law
7 that requires an officer to undertake particular
8 procedures in the preparation of a warrant. The Ninth's
9 Circuit novel proofreading requirement had not even been
10 conceived at the time of this search. In addition, the
11 law is in disarray concerning the circumstances under
12 which an affidavit or an application may be considered in
13 construing the warrant. Off - Agent Groh also was
14 operating under a reasonable mistake of fact.

15 QUESTION: But if he had been on the way to the
16 residence and 3 minutes before he got there, the residents
17 say, oh, this is a terrible mistake here, would he have
18 the obligation to turn around and go back or have somebody
19 bring him the affidavit out?

20 MR. SCHLICK: Under Steele, the question would be
21 whether it was sufficiently clear what the magistrate
22 authorized. We believe under these circumstances it was
23 clear, so he would not have had that obligation. But as a
24 practical matter, and this is very important, officers are
25 not going to conduct searches when there is a question

1 about the scope -

2 QUESTION: So - so that - so that even if he sees
3 the mistake before he makes the entry on the premises, he
4 can - he can proceed?

5 MR. SCHLICK: If it's sufficiently clear under
6 Steele, yes.

7 QUESTION: And under these facts?

8 MR. SCHLICK: Yes, yes. And - and if - and
9 again, this goes to the purpose of the particularity
10 requirement, which is ensuring that the search is
11 conducted in accordance with what the magistrate
12 authorized. If that is - if that is satisfied, then there
13 is no constitute - then there is no constitutional
14 violation and there's no constitutional interest in having
15 the officer delay the search. But again, as a practical
16 matter, the officer is going to want to be sure that
17 suppression remedy -

18 QUESTION: Well, but - but then - but then you're
19 saying this warrant is sufficient?

20 MR. SCHLICK: Yes. The -

21 QUESTION: So - so - you want us to write an
22 opinion to say that we can have warrants like this all the
23 time and there's no problem

24 MR. SCHLICK: Again, that's the constitutional
25 rule, but as a practical matter, officers are not going to

1 take risks when they're - when they don't face an exigent
2 circumstance -

3 QUESTION: Talking about a constitutional minimum
4 - you say that a constitutional minimum - this warrant
5 would - is - is adequate under the Fourth Amendment in all
6 circumstances?

7 MR. SCHLICK: Under these circumstances, which
8 include particularly the references in the warrant, Agent
9 Groh's application and affidavit, which include the clear
10 lift - list - in his application and the magistrate's
11 signature on the warrant without making any edits.

12 This is not in the typed version that we have,
13 but if you look at the actual warrant form, which is
14 document number five in the district court, you can see
15 that the - that the magistrate signed the warrant form and
16 it's a typed form on which there are handwritten notes, so
17 - so -

18 QUESTION: I did see it. I did look at that and
19 it occurred to me at that moment that all you're asking
20 people to do is just glance at the document quickly to
21 catch obvious mistakes, which this is.

22 MR. SCHLICK: And - and in this case, if Agent
23 Groh had glanced -

24 QUESTION: Thank you, Mr. Schlick.

25 Mr. Kozakiewicz, we'll hear from you.

1 ORAL ARGUMENT OF VINCENT J. KOZAKIEWICZ

2 ON BEHALF OF THE RESPONDENT

3 MR. KOZAKIEWICZ: Mr. Chief Justice, and may it
4 please the Court:

5 The Ramirez home was searched pursuant to a
6 nonsensical warrant. They were deprived of the
7 protections of the essential function of the warrant,
8 which this Court has said is to assure the individual
9 whose property is being searched and seized of the lawful
10 authority of the executing officer, his need to search,
11 and the limits of his power to search. The particularity
12 requirement has -

13 QUESTION: Where - where do - where do we say
14 that? Did we say that in a case that -

15 MR. KOZAKIEWICZ: Yes, Your Honor, you say that
16 in - it was actually quoted in the McGrew case. It was
17 stated in Illinois v. Gates and in citing Chadwick at page
18 9 in California v. Acevedo.

19 QUESTION: If - if - if that is indeed the
20 purpose of the warrant, isn't it passing strange that the
21 rules relating to warrants do not require that the warrant
22 be served, be presented to the individual, unless and
23 until something is taken, at which point the warrant has
24 to be left plus a list of the things taken? I mean, I
25 just find it remarkable that our rules of criminal

1 procedure would not require the service of a warrant, and
2 indeed, if that is the purpose of a warrant, what do you
3 do about warrants for electronic surveillance, for
4 wiretaps? Does - do - do you have to serve the object of
5 the wiretap with a warrant saying, we're going to be
6 tapping your phone, so he'll say, oh, thank you very much,
7 you know, I'll use another phone.

8 MR. KOZAKIEWICZ: With - with respect to a
9 wiretap, you have some exigent circumstances there. What
10 the - what the Ramirezes were facing were the search of
11 their home -

12 QUESTION: It's not - what's exigent - what's
13 exigent about it? Not necessarily, I -

14 MR. KOZAKIEWICZ: There's no necessarily -
15 there's - with a wiretap there's no invasion, a physical
16 invasion of the home and the rummaging through their
17 personal belongings.

18 QUESTION: Counsel, I suppose you don't have to
19 take the position that there's some right of the homeowner
20 to examine the warrant before the officer is admitted to
21 the home to win this case, do you?

22 MR. KOZAKIEWICZ: That's true, Your -

23 QUESTION: Why are you taking that position then?
24 That gets you into a lot of hot water, because it hasn't
25 been clearly defined. I mean, the Ninth Circuit seemed to

1 place a lot of weight on the point, but I'm not sure it is
2 necessary for you to prevail in this case. I'd like to
3 hear your views.

4 MR. KOZAKIEWICZ: Your - Your Honor, that - that
5 is correct. The - the warrant was - was facially invalid,
6 it was plain to see, but the - the Ninth Circuit has
7 established a very - clearly established rules to say that
8 the warrant required a particular description. We are
9 willing to - if it's not contained within the four corners
10 of that document - to go be - to look at documents outside
11 the four corners, provided it meets certain criteria, that
12 being it is specifically referenced into the - into - in
13 the warrant itself and somehow accompanies or is attached
14 to the warrant.

15 Under those circumstances it would become part
16 of the warrant and they would recognize that, and the
17 court went on to say that that has - was the rule in the
18 Ninth Circuit for a long period of time. Agent Groh
19 should have known about that, and it was - it was the
20 clear law and therefore a constitutional violation took
21 place and he did not - could not have good faith in his
22 belief that he complied with that requirement of the
23 warrant.

24 QUESTION: Why, when McGrew didn't issue until 6
25 months after the conduct in question? McGrew set the

1 circuit law for the - at least for the Ninth. It said
2 that the executing officer has to read the warrant, but
3 that wasn't on the books when this search occurred.

4 MR. KOZAKIEWICZ: Your Honor, McGrew was decided
5 6 months after the search in this case. However, the
6 events that took place in McGrew happened before this
7 case. If McGrew had never occurred, this would have been
8 -

9 QUESTION: But what made the law clear in the
10 Ninth Circuit was not the timing of the McGrew search, but
11 the ruling of the Ninth Circuit.

12 MR. KOZAKIEWICZ: The - the McGrew decision said
13 that it was clearly established at - through their - their
14 prior decisions of the requirement that the warrant refer
15 to and either have attached to or accompany the affidavit
16 if you wanted to - to use it as a basis to meet the
17 particularity requirement, and it - it looked at other
18 cases besides just that one. This has been the law in
19 this circuit for over - over a decade.

20 QUESTION: I see that there is a serious
21 question, I think, underlying what you're saying. You're
22 saying that this is really a question of cross-reference.
23 The Constitution requires the warrant to describe the
24 things to be seized. Now, what the Government says is
25 this - we have permitted in cases that requirement to be

1 fulfilled where the warrant piece of paper is perhaps
2 blank or erroneous, but it cross-references another
3 document. And you've said, it can do that where that
4 other document is physically attached or, let's say, at
5 least in the car. There was one case that said in the
6 car, but not where it's in a vault someplace. And Justice
7 Scalia, I think, asked why - why is that? Because if the
8 purpose of the Fourth Amendment is not to alert the
9 homeowner, but simply to be certain there is a check on
10 the searcher, why have the cases come out the way you've
11 just described them?

12 MR. KOZAKIEWICZ: Because it's a - not to have
13 that warrant or the supporting documentation to the
14 warrant present to meet the particularity requirement is
15 an opportunity for abuse.

16 QUESTION: What kind of abuse?

17 MR. KOZAKIEWICZ: To be abuse to - to the - that
18 the officer can come to the home, say I'm planning - I'm
19 planning to search for - for something, ransack the house,
20 find nothing, leave no warrant, and the person has no idea
21 of the legal authority of - of why the officer was there,
22 what he was doing there. He could have the opportunity to
23 decide he wants to go in and rummage through the personal
24 papers and -

25 QUESTION: But he didn't, and that goes back to a

1 question that Justice Scalia raised earlier. Assuming
2 there is a violation of the Fourth Amendment, you're
3 bringing a Bivens action, and if we recall the facts in
4 Bivens that - the police acted as rough as can be, they
5 manacled the man, they told him they were going to arrest
6 his wife and children, they hauled him off to jail and
7 they strip-searched him. Nothing like that happened here.

8 MR. KOZAKIEWICZ: That's correct, Your Honor.
9 However, Bivens 19 - in 1983 action, depending upon
10 whether the actor is State or Federal agent, follow the
11 same - same line of reasoning of whether - was the action
12 a violation of constitutional right and was it objectively
13 reasonable.

14 QUESTION: But the damages here, nothing happened
15 here that would not have happened if the right portion of
16 the application had been copied into the warrant.

17 MR. KOZAKIEWICZ: The - the - the damages was to
18 - to the - the homeowner's ability to be assured of the
19 authority of the officer to be here.

20 QUESTION: Well, I'm not sure about that. Does
21 the homeowner say, well, I'd like to - this is a long
22 warrant, I have to sit down and read this, and they sit
23 down by the fire and read the warrant and discuss it?
24 That's not the way it works.

25 MR. KOZAKIEWICZ: Under the circumstances of this

1 case, there was no opportunity ever for the - the
2 homeowner to - to know what -

3 QUESTION: Well, but we're asking what the
4 general requirement is. Once - once the homeowner finds
5 that the police have the authority to enter, then don't
6 the cases teach us that the purpose of the warrant is to
7 control the discretion of the officer, not the knowledge
8 of the homeowner, and incidentally, I think you might be
9 able to read Rule 41 as saying that when an officer leaves
10 he has to give a copy of the warrant whether he takes
11 anything or not. I'm - I'm quite sure that that's the
12 right interpretation.

13 MR. KOZAKIEWICZ: Well, you're -

14 QUESTION: Let's assume that that's done. I
15 don't think the homeowner has the right to monitor the
16 search. There's - there's no authority for that. The
17 Ninth Circuit seemed to say - think that.

18 MR. KOZAKIEWICZ: Yes, Your Honor, the Ninth
19 Circuit said that and, in fact, in the Gant case, which
20 was cited in - in McGrew, they said that there's a - a
21 duty of the officer under the rule to provide the
22 homeowner with the warrant prior to leaving the scene.

23 QUESTION: Under the rule, they said? Under the
24 rule? Well.

25 MR. KOZAKIEWICZ: Yes, Your Honor.

1 QUESTION: That's not true, is it? I mean, you -
2 you can create such a duty -

3 MR. KOZAKIEWICZ: No.

4 QUESTION: - but it doesn't appear in the rule at
5 all, does it?

6 MR. KOZAKIEWICZ: The - the Gant decision that
7 referred to the - to the rule was looking at the - the
8 argument was made in that case by the Government that the
9 rule only required it, and said that since the - the Katz
10 decision says that it - the rule does not invariably
11 require it to - the Government to serve the warrant, that
12 it must usually require that it be done.

13 QUESTION: Doesn't say anything at all about
14 warrant when no property is taken. As far as - I have the
15 text of Rule 41 in front of me. It talks about leaving
16 the warrant when you've taken property. There's not one
17 word in this that I can see about leaving the warrant when
18 you haven't taken property.

19 MR. KOZAKIEWICZ: That's correct, Your Honor, and
20 that's the - the real problem in this - in this case, when
21 if - if there is no duty to leave a warrant, as suggested
22 by the - the United States in their - their brief when no
23 property is taken, then it's the invitation to abuse that
24 I - I talked about earlier.

25 QUESTION: Well, but do you - do you have to - do

1 you have to maintain that position to win your case? I
2 mean, do you have to get us to accept your - that - that
3 proposition in order to win your case?

4 MR. KOZAKIEWICZ: No. I think the plain language
5 of the particularity requirement is all that is needed and
6 this does not meet the particularity requirement.

7 QUESTION: Can we get back to the question I
8 think that you hadn't completed your answer to before?
9 So, assuming that there is a violation of the Fourth
10 Amendment, what harm to this family - I mean, the contrast
11 with Bivens in that regard is stark, because the - the -
12 what you recited, the same thing would happen if the
13 warrant had copied the right paragraph of the application.
14 There was no rough stuff.

15 MR. KOZAKIEWICZ: The damage is the fact that
16 their constitutional right to have a - a properly executed
17 and a properly written warrant prior to the invasion of
18 the home.

19 QUESTION: So -

20 QUESTION: Of course, that's really not what the
21 Fourth Amendment says, is it? It just - it doesn't say
22 you need - you need - I mean, surely there's some play in
23 the joints, isn't there? It's - it categorically
24 prohibits unreasonable searches and seizures, right?

25 MR. KOZAKIEWICZ: Correct.

1 QUESTION: And then it goes on to say, and any
2 warrants, you know, where you need a warrant shall
3 particularly describe the - the person or place to be
4 searched and the items to be seized. But it doesn't say
5 categorically that you can't - you need a warrant all the
6 time, so there's some play in the joints. Why couldn't we
7 say that at least in this case where there was a good-
8 faith attempt to get a warrant and where the affidavit
9 would have justified a warrant, it is not the one thing
10 that the Fourth Amendment prohibits, an unreasonable
11 search and seizure, to go ahead with this defective
12 warrant?

13 MR. KOZAKIEWICZ: Because there was no effort on
14 the part of Agent Groh to comply with that particular
15 requirement, and that leads to the opportunity for abuse
16 because he - there is no evidence in the - in the record
17 to show that he had any - did anything to comply - to see
18 that he had a warrant that met the particularity
19 requirement.

20 QUESTION: But - but there's nothing in the
21 Fourth Amendment that requires a warrant, even for the
22 entry into a home, and as you know of, many entries into
23 homes are done without a warrant when there are exigent
24 circumstances. Now, if - if you can say that that is not
25 an unreasonable search and seizure, why can you not say it

1 is not an unreasonable search and seizure to proceed on
2 the basis of a warrant that has a - a technical - clear
3 technical defect, but nonetheless was sought and - and
4 would have issued in perfect conformity with
5 constitutional requirements. Why does that make it an
6 unreasonable search and seizure? I can see that it makes
7 it a search and seizure without a proper warrant as
8 defined in Article IV - in the Fourth Amendment - but the
9 Fourth Amendment does not require a warrant all the time.

10 MR. KOZAKIEWICZ: It does not require a warrant
11 all the time if there are exigent circumstances. There
12 were no exigent circumstances in this case.

13 QUESTION: Well, that's not the only exception.
14 I mean, that's one exception that - that we've developed.
15 Why can't we say another exception is where you've done
16 everything that is necessary to get a warrant, and the
17 warrant you've gotten, yeah, it doesn't really comply with
18 the description of the warrant there, but still to proceed
19 that way is not unreasonable search and seizure? It's
20 mistaken but it's not an unreasonable search and seizure.

21 MR. KOZAKIEWICZ: Because I think the - that
22 would trivialize the - the requirement of the
23 particularity clause, because particularity as well as
24 probable cause weigh into the - the general warrant
25 situation and -

1 QUESTION: Are you - you suggesting that maybe it
2 was unreasonable? Since there were no exigent
3 circumstances this warrant could have been executed the
4 next day for as far as we know from this record, to go
5 back and say, oh my goodness, look at this, it's a general
6 warrant, I better get it particularized.

7 MR. KOZAKIEWICZ: That - that's correct, and he -
8 he should have done that, because the - the problem here
9 is that there was - it was plain for everyone to see.
10 This was the - the Leon - the warrant that was envisioned
11 in Leon that was so facially valid that no reasonable
12 officer could rely on it -

13 QUESTION: With respect to Leon, Mr. Cordray
14 urged that if you would meet the good-faith exception, in
15 any case where the good-faith exception would apply so the
16 evidence isn't suppressed, the officer would have
17 qualified immunity. Do you agree that that's a - a proper
18 equation?

19 MR. KOZAKIEWICZ: Only if there is good faith
20 that the officer attempted to comply with the
21 particularity requirement, because if there was good faith
22 that there was probable cause, that does not supply the
23 particularity any more than the oath and affirmation to
24 say that this was oath and affirmation. To have a valid
25 warrant you need all legs of the stool, and the

1 particularity requirement is one of those.

2 QUESTION: May I ask you a question about the -

3 QUESTION: So what you are saying is not because
4 the - the same reason it's not a qualified immunity is the
5 same reason it isn't an unreasonable search. It isn't a
6 reasonable search, isn't a reasonable search, and there is
7 no qualified immunity because he didn't even glance at the
8 document, and for the head man not to glance at the
9 document is not good faith and is unreasonable. If that's
10 your argument - as I guess you're going to accept this now
11 -

12 MR. KOZAKIEWICZ: Yes.

13 QUESTION: All right, fine. I'd like to go back
14 for one second to Justice Ginsburg's - one of her initial
15 questions, is, what is it you are seeking here? A dollar
16 in damages and an apology? Because, after all, if you
17 accept my argument, they would have just gone back and
18 gotten a better warrant and it would have taken them a
19 couple of hours and all the same thing would have
20 happened. So - so what - what is it you're seeking in
21 this lawsuit? An apology and a dollar or something else?

22 MR. KOZAKIEWICZ: We're seeking money damages
23 that a - a jury would -

24 QUESTION: Well, is there any way it could be
25 more than a dollar?

1 MR. KOZAKIEWICZ: It - it would depend, Your
2 Honor, on -
3 QUESTION: What have you asked for in the
4 complaint?
5 MR. KOZAKIEWICZ: We didn't put - specify a
6 dollar amount in the complaint.
7 QUESTION: Is there any way it could be more than
8 a dollar? I mean, you must have thought this through,
9 because, after all, you have filed a complaint and they
10 hired you and -
11 MR. KOZAKIEWICZ: Yes, it is - yes, it is, Your
12 Honor, because the trauma - the traumatization that Mrs.
13 Ramirez went through by agents coming into her home and
14 saying, we have a warrant to search for explosives -
15 QUESTION: Is different from what it would have
16 happened an hour later? Different from what -
17 MR. KOZAKIEWICZ: Yes, yes.
18 QUESTION: - would have happened if they'd
19 corrected the error and gone back and done the same thing
20 -
21 MR. KOZAKIEWICZ: That - that's correct -
22 QUESTION: - because?
23 MR. KOZAKIEWICZ: Because there was that time
24 frame, and in this case it was a continue of a time frame
25 that she was under - under the fright of people being in

1 her home, searching it, ransacking it, going - going
2 through it. There was - we've alleged in the complaint
3 damage to personal property. All this was done without
4 her knowing and whether they had the right to be there,
5 what they were looking for other than -

6 QUESTION: But I - I thought the facts say that
7 they correctly - at least in the petitioner's brief - they
8 say that they correctly notified the homeowner about the
9 purpose and objects of the search.

10 MR. KOZAKIEWICZ: That would be an oral
11 notification, and there is no assurance given to the -
12 through oral notification, he could make up anything he
13 wants.

14 QUESTION: You think when the Fourth Amendment
15 was adopted or when the English tradition that underlaid
16 the Fourth Amendment was - was formed, most people could
17 read a warrant?

18 MR. KOZAKIEWICZ: I don't know, Your Honor.

19 QUESTION: Then - then do you think the
20 homeowners would have the right to exclude the constable
21 until he could get somebody who was literate to read the
22 warrant that the constable presented to him? Maybe call
23 his attorney and say, you know, there's a warrant here I
24 can't read, can you come over and read it for me?

25 QUESTION: They didn't have telephones.

1 (Laughter.)

2 QUESTION: I didn't say call him by phone, Mr
3 Chief Justice.

4 (Laughter.)

5 QUESTION: His attorney lived - lived across the
6 street actually. I mean, this - this notion that this is
7 part of the - of the warrant requirement, it seems to me,
8 is based on a real misunderstanding of - people couldn't
9 read, most of them

10 MR. KOZAKIEWICZ: Well, that makes an assumption
11 of what took place there. In today's society most people
12 can read and Mrs. Ramirez can -

13 QUESTION: Well, we might - we - maybe we should
14 add that requirement to the Fourth Amendment. I assume we
15 could amend the Fourth Amendment to say, in addition to
16 what it used to mean, you have to present the warrant at
17 least to people who are literate.

18 QUESTION: Counsel, if we conclude that there is,
19 in fact, no requirement, as the Ninth Circuit seemed to
20 think there was, that the warrant be shown to the
21 homeowner in advance, assume that's not a requirement.
22 What are the damages left other than attorneys fees?

23 MR. KOZAKIEWICZ: If the - the -

24 QUESTION: Are you really - is it really a fight
25 about attorneys' fees because it's taken so long to get up

1 here?

2 MR. KOZAKIEWICZ: No, Your Honor.

3 QUESTION: No?

4 MR. KOZAKIEWICZ: No. There's - there's - that
5 hasn't even come up.

6 QUESTION: I assume it will.

7 (Laughter.)

8 QUESTION: May I ask you another question about
9 the warrant? Everybody's been assuming that there's only
10 one particularity requirement in the Constitution. There
11 are two. There's the - particularly describing the place
12 to be searched and also the items to be seized, and I was
13 wondering if one couldn't read this warrant as just
14 satisfying the particularity requirement with regard to
15 what was to be searched, because as I understand it, it
16 was - the ranch was a very big ranch and they only wanted
17 to search this one house with a couple of - the garage
18 next to it, and they didn't search the entire ranch, did
19 they?

20 MR. KOZAKIEWICZ: Yes, they did go to search the
21 entire ranch.

22 QUESTION: Oh, they did?

23 MR. KOZAKIEWICZ: And they did look in various
24 other buildings. There was a statement in the affidavits
25 - in the complaint, which has not been denied that they -

1 in some ways secured - they - there was admissions in -
2 in answers -

3 QUESTION: I see. I thought one might read the
4 warrant as describing this particular blue - blue house
5 and so forth as the particular part of the ranch that was
6 to be searched for the guns and so forth, but that's not
7 the case? They searched everything?

8 MR. KOZAKIEWICZ: Yes, that's -

9 QUESTION: I see.

10 MR. KOZAKIEWICZ: That's correct. But if you
11 were to - if you were to read it that it was the - to
12 search the ranch for the blue house, then -

13 QUESTION: This would be - no, I wouldn't - you
14 wouldn't obviously be searching for the blue house, but
15 you might read this as having confined the search to the
16 blue house as opposed to the entire ranch, which is
17 described - but you - but that - that wasn't done.

18 MR. KOZAKIEWICZ: No.

19 QUESTION: So then it is really nonsensical on
20 its face.

21 MR. KOZAKIEWICZ: That's the position that we've
22 taken all along.

23 QUESTION: Well, so far as damages are concerned,
24 I suppose your claim is analogous to a common law
25 trespass, that someone has come on the - come on your

1 property without any right to do so, and so you - you
2 could analogize that to whatever damages you could get for
3 a trespass.

4 MR. KOZAKIEWICZ: That would be correct, Your
5 Honor. We - we haven't thought about damages in - in your
6 - since the - the motion to dismiss was - was granted and
7 we've been arguing the - the points of law.

8 QUESTION: But I thought you did make some kind
9 of enumeration. You mentioned Mr. Ramirez's drafting
10 table was broken and you said she was frightened, and I
11 think one other thing you alleged.

12 MR. KOZAKIEWICZ: Yes, that's correct. There
13 were - there were damages -

14 QUESTION: Oh, yes, the reputation to the - the
15 reputation in the neighborhood, but that would have been
16 affected just the same if the police came there with an
17 entirely proper warrant.

18 MR. KOZAKIEWICZ: That's - that damage would have
19 been the - been the same. The - the damage to them is the
20 fact that the search was done and there was no - since the
21 search was under a illegal warrant, we contend that the
22 search was illegal and any damages coming through from the
23 legal search are compensable, but that's to be decided
24 down - down the road.

25 The - the Marks v. Clarke case that was referred

1 to earlier about - saying that there was no duty to read
2 the warrant by the officers is not entirely correct. In
3 the - in the Marks case, in the - the Ninth Circuit said
4 that there was no duty for the officers executing the
5 warrant to read it, as long as they be - they fulfilled
6 their duty to become familiar with it before they went out
7 there. However, the - the court did say that the officers
8 who applied for the warrant had a duty to make sure that
9 they had the valid warrant.

10 If there are no further questions -

11 QUESTION: Thank you, Mr. Kozaki ewi cz.

12 Mr. Cordray, you have 2 minutes remaining.

13 REBUTTAL ARGUMENT OF RICHARD A. CORDRAY

14 ON BEHALF OF THE PETITIONER

15 MR. CORDRAY: Your Honor, on the qualified
16 immunity point, there is plain language in the
17 Constitution as to what the Fourth Amendment says, but
18 this Court said in Anderson v. Creighton, that is not the
19 correct approach. It's not at the level of what the
20 Constitution says in the abstract. It's how it's applied
21 in particular circumstances. And here, the Ninth Circuit
22 did move the law in specific respects, and this Court is
23 being asked to move the law and to answer questions that
24 we either open, and in fact are controverted in the lower
25 courts as we speak.

1 Sheppard had established that you can go beyond
2 the four corners of the page of the warrant to look at
3 supporting materials when there's any kind of suitable
4 words of reference. The Ninth Circuit itself has
5 clarified since this case, in U.S. v. Vesikuru, 314 F.3d
6 1116, suitable words of reference can be that we're
7 relying on the sworn complaint to supply probable cause,
8 very similar, in fact indistinguishable, from the words of
9 reference in this warrant in this case. You're being
10 asked to retreat from Sheppard and to clarify when a
11 warrant can or cannot incorporate accompanying affidavit
12 materials and that's a question you're being asked to
13 answer in this case and then apply against this officer
14 retrospectively to give damages and deny qualified
15 immunity. That's inappropriate under this Court's settled
16 case law.

17 Second, you're being asked in this case to say
18 specifically an officer has a constitutional duty to
19 proofread and re-check a warrant after it has been issued
20 by the magistrate, which this Court has never held, and
21 this Court has said in prior cases, including Illinois v.
22 Gates, that the officers' sole duty once they apply for an
23 order of authority is to execute the warrant faithfully in
24 accordance with the constraints imposed upon them.

25 McGrew moved the law in this case. It was

1 decided 6 months after this search occurred. This
2 decision below in this Ramirez case moved the law further,
3 and yet the Court is being asked to deny qualified
4 immunity to this officer here.

5 As for the Leon dictum, Justice Kennedy, you
6 asked, we believe that if in fact Agent Groh had noticed
7 this error, if anyone had called it to his attention
8 during proceeding to execute the search, the more
9 reasonable course of conduct would be to stop and seek
10 clarification from the court, as the officers did in
11 Maryland v. Garrison. Having not noticed the error,
12 having gone ahead and executed the warrant in good faith,
13 having executed the search in compliance with the request
14 made to the court, that is good faith and - .

15 QUESTION: Would they have had a duty to turn
16 around if they'd noticed the error 5 minutes before they'd
17 come to the property?

18 MR. KOZAKIEWICZ: That is a debatable question.
19 I think that the better approach would have been to stop
20 at that moment and seek clarification from the court since
21 there were no exigent circumstances. But here, the
22 officer had not noticed the error, the magistrate had not
23 noticed the error, no one on the team had noticed the
24 error. The next day, a lawyer sitting in his office
25 reading the page in the cold light of day noticed the

1 error. Immediately Agent Groh responded, faxed him the
2 face page of the application. His conduct here was
3 clearly in good faith and - and to impose qualified
4 immunity would be wrong and would be in total violation of
5 this Court's cases and clearly established law.

6 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cordray.
7 The case is submitted.

8 (Whereupon, at 11:00 a.m., the case in the
9 above-entitled matter was submitted.)
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